BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEPHEN F. ROGERS	)	
Claimant	)	
VS.	)	
	)	Docket No. 190,548
ROGERS WELL SERVICE	)	
Respondent	)	
AND	)	
	)	
ITT HARTFORD as servicing agent for	)	
UNITED STATES FIDELITY & GUARANTY CO.	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Kenneth S. Johnson on February 13, 1998. The Appeals Board heard oral argument July 1, 1998.

APPEARANCES

Respondent and its insurance carrier appeared by their attorney, Richard J. Liby of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Randall D. Grisell of Garden City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record and adopted the stipulations identified in the Award.

ISSUES

The sole issue on appeal is whether the Kansas Workers Compensation Fund (Fund) should be responsible for all or any portion of the benefits paid claimant. Respondent and claimant have now settled. The Fund does not dispute the reasonableness of the settlement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Administrative Law Judge found claimant sustained only one accident and, on that basis, denied respondent's request to shift liability to the Fund. After reviewing the evidence and considering the arguments by the parties, the Appeals Board finds that the decision to deny Fund liability should be affirmed but the Board does so for reasons different from the reasons given by the Administrative Law Judge.

Findings of Fact

(1) Claimant was the owner and an employee of respondent Rogers Well Service.

(2) Claimant was injured at work on November 18, 1992, when a well head exploded and pinned him against the pumping unit. The accident caused injury to his low back and caused some vision problems.

(3) Claimant was taken to the emergency room immediately after the accident. He spent one day in the hospital and was treated by Dr. Virgilio M. Taduran. Claimant also saw Dr. Eustaquio O. Abay II on November 18, 1992. Claimant was off work for two days and then returned to work.

(4) When he returned to work, claimant modified his job duties. He had, before the accident, lifted as much as 300 pounds. After the accident, he could lift only approximately 50 pounds. Also, he could not stand as long after the accident and had to shut the rig down when his back was especially bothering him. Claimant also continued to have vision problems with periodic episodes of tunnel vision.

(5) In spite of the job modifications, the work claimant did after he returned to work aggravated and permanently worsened his low back injury. Claimant noticed progressive weakness, loss of feeling in his legs, and a tingling in his legs and feet.

(6) In June 1994, claimant fell to the ground while playing golf. As he teed off, he twisted and he suddenly could not feel his legs. Claimant recovered enough to complete the round of golf.

(7) Claimant sold his business in 1994, largely because of his back problems resulting from his back injury.

(8) At the request of claimant's counsel, claimant was examined and evaluated by Dr. Lawrence R. Blaty in February of 1997. Dr. Blaty diagnosed chronic low back syndrome with left radicular symptoms and visual changes which were resolving. He rated the impairment as 8 percent to the body as a whole. He recommended claimant limit carrying to no more than 40 pounds occasionally or 20 pounds frequently. He recommended claimant be limited to occasional bending or twisting with his lower back and avoid any hyperextension activities. He also recommended claimant be limited to occasional climbing, crawling, or kneeling type activities.

(9) Dr. Blaty testified that 50 percent of claimant's permanent impairment was caused by the initial injury and 50 percent resulted from a combination of his subsequent work and the golfing incident in June 1994. Dr. Blaty also testified that claimant was, in his opinion, a handicapped employee after the initial accident in November 1992. Finally, he testified that the additional impairment from work activities and the golfing incident would not have occurred but for the accident and injury in November 1992.

(10) In August 1997, claimant settled his claim with respondent. Claimant received medical expenses, 2.14 weeks of temporary total disability compensation, and a lump sum payment of $18,000.

Conclusions of Law

(1) Under the law applicable at the time of claimant's accident, the Kansas Workers Compensation Act shifted liability for injuries to handicapped employees under certain circumstances. If the employer knowingly employed or retained a handicapped employee and that employee later suffered an injury which was caused or contributed to by the handicap, the Fund is liable for all or a part of the benefits. K.S.A. 1992 Supp. 44-567.

(2) The Fund is liable for all of the benefits if the disability would not have occurred but for the preexisting impairment. K.S.A. 1992 Supp. 44-567.

(3) If the disability would have occurred regardless of the preexisting impairment, but the resulting disability was contributed to by the preexisting impairment, the Fund is liable for the portion of the award attributable to the preexisting impairment. K.S.A. 1992 Supp. 44-567.

(4) The Board finds respondent has not met its burden of proving the extent of fund liability, if any. Dr. Blaty provides the only medical opinion regarding the relationship between the accident of November 18, 1992, and any subsequent injury. Dr. Blaty opines that 50 percent of the impairment is from the specific accident in 1992 and 50 percent from the golfing incident and work activities combined. But Dr. Blaty does not separate or provide any basis for determining how much of the new impairment is attributable to the golfing incident and how much to the work activities. The Fund would be liable only for disability from a second work-related accident. Since there is no basis for determining how

much impairment is attributable to the work activities, there is no basis for determining how much disability was caused by the second accident or how much should be assessed against the Fund.

(5) The Board also finds that the date of accident for the second accident, if any, would have been the last day claimant worked. Claimant left the work in the fall of 1994 due to the injuries. The date of accident in a repetitive trauma case is the last day claimant performs services for his or her employer and is required to stop working as a direct result of the pain and disability resulting from the injury. Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

(6) For accidents occurring after July 1, 1994, the Fund has no liability. K.S.A. 44-566a(e)(1).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Kenneth S. Johnson, dated February 13, 1998, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Richard J. Liby, Wichita, KS
Randall D. Grisell, Garden City, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director